Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

RALPH W. CUTTER,

Petitioner,

v.

NORTHWEST ADMINISTRATORS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ERISA grants employee benefit plan administrators a civil right of action for "equitable relief" by which the plan can sue for equitable restitution of benefits paid out. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d (2002), the Court held that this right of action is not authorized under ERISA where the defendant does not have possession of the funds that were paid out because such a claim is for legal damages and not equitable restitution. The Court applied that holding in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 126 S.Ct. 1869, 164 L.Ed.2d 612 (2006) to affirm a judgment of equitable restitution of plan benefits because the defendant had possession of the funds. And in *Hallback v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872 (8th Cir., 2009) the Eight Circuit applied the holding in *Knudson* to deny plan beneficiaries a right to sue the plan to recover their losses even if the losses were "ill gotten gains".

Here, the plan sued the defendant claiming "equitable restitution" under ERISA to recover benefits paid to third parties; the money is not and never was in the defendant's possession. The Ninth Circuit affirmed the plan's recovery on the grounds that they were "ill gotten gains". Two questions are presented:

1. Is a claim by a health benefits administrator for "equitable relief" pursuant to the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1132(a)(3) authorized where the defendant does not and never did have in his possession the funds the administrator seeks to recover?

2. Should an undefined term in an ERISA governed health benefits plan be understood in its ordinary meaning?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ralph W. Cutter, seeks a Writ of Certiorari to reverse the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a – 3a) is unreported. The Order of the United States District Court for the Western District of Washington at Seattle was filed on January 24, 2008 (App., *infra*, 4a – 21a) and is unreported.

JURISDICTION

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit was entered on July 9, 2009. A timely petition for rehearing *en banc* was denied on August 25, 2009 (App., *infra*, 22a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISION INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1132(a)(3) provides in relevant part:

> [a] civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of

> the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

STATEMENT

This case raises an important, recurring question about the right of an ERISA governed employee benefits administrator to recover benefit payments made under its health plan. The important and recurring question is the scope of the right of civil action for "other appropriate equitable relief." The Court addressed the scope of that relief in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d (2002), and drew a distinction between *equitable* and *legal* relief, concluding that the scope of equitable relief under ERISA did not extend to recovery of benefits paid where the defendant did not have possession of the funds sought.

The Ninth Circuit's ruling that the administrator "was entitled to the equitable remedy of restitution despite the fact that [defendant] never possessed the medical payments it made" creates two conflicts. First, it conflicts with this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson, Id.* Second, it conflicts with the decision of the Court of Appeals for the 8th Circuit in *Hallback v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872 (8th Cir. 2009).

This case also presents an important and recurring question about the meaning of undefined terms in a health benefits plan.

A. The facts of the case

Respondent, Northwest Administrators, is the administrator of an ERISA governed health plan. Petitioner, Ralph W. Cutter, is a retired truck driver and health plan beneficiary.

Mr. Cutter married Rosalie Devereaux in a religious ceremony performed by Reverend Dee Miller in 1987 and, following the marriage, Ms. Devereaux enrolled in the health plan. The health plan documents did not define the term "married" and required only a marriage certificate, which Reverend Miller issued to them in 1987 following the ceremony. Mr. Cutter and Ms. Devereaux did not have a marriage license.

Many years later, Ms. Devereaux got cancer, the health plan paid her health care providers and, on August 11, 2004 she died. Following her death, her children from a prior marriage commenced a probate in county court, and Mr. Cutter made a claim for his community property interest in certain real estate. The probate judge denied Mr. Cutter's claim, ruling that there was no legal marriage because they did not have a marriage license.

After the probate trial, Mr. Cutter asked Northwest Administrators if they had the documents that Ms. Devereaux signed in which she held herself out as his married spouse. Northwest said "yes" and sent him the documents, and then they demanded that he pay the $70,000+ that had been paid for Ms. Devereaux's cancer care. Northwest contended that only spouses of a legal marriage are entitled to health benefits even though the plan says no such thing.

Mr. Cutter does not possess and never did have in his possession any of the funds paid for Ms. Devereaux's health care as all money was paid directly to the health care providers.

Northwest sued Mr. Cutter in U. S. District Court alleging rights under ERISA and state law claims for fraud and misrepresentation.[1] In the ERISA claim, Northwest sought "other appropriate equitable relief" pursuant to 29 U.S.C. § 1132(a)(3). The District Court had jurisdiction over such claims pursuant to 29 U.S.C. § 1132 (e).

District Court Judge Coughenour granted partial summary judgment to Northwest on its ERISA claim. He also granted partial summary judgment to Mr. Cutter and dismissed all state law claims on grounds of federal preemption and, although Cutter did not raise a claim for attorney fees in his motion, Judge Coughenour summarily denied attorney fees. Mr. Cutter appealed the District Court's decision, Northwest did not appeal; and the Court of Appeals for the Ninth Circuit affirmed.

B. The Court of Appeals' Decision

The panel concluded that possession of the funds was not determinative because the medical payments were "ill gotten gains" procured after "Cutter wrongfully signed Devereaux up for benefits under his health plan when she was not his wife." (App. 2a).

[1] The dark irony is that this suit would never have been filed if Mr. Cutter had not called Northwest Administrators in good faith to ask for their help.

The panel also concluded that the decision in the probate case barred Mr. Cutter from contending he was married under the rules of collateral estoppel and that the words "married" and "spouse" used in the health plan were not ambiguous.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's decision conflicts with this Court's decisions.

The Court addressed the scope of an ERISA claim for "other appropriate equitable relief" in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d (2002). The Court drew a distinction between *equitable* and *legal* relief as it existed in the days of the divided bench, concluding that Congress intended for the scope of equitable restitution under ERISA to extend no further than equitable restitution as it existed in English common law. The Court said,

> [F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession. *Id.*, 534 U.S. at 214.

In such cases, plaintiff with a claim for "equitable relief" under ERISA may seek to impose a constructive trust or equitable lien on the traceable funds. However, a claim for "equitable relief" under ERISA does not extend to recovery of damages where the defendant does not have possession of the funds sought.

This distinction between remedies in equity and in law under ERISA was reaffirmed and applied in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 126 S.Ct. 1869, 164 L.Ed.2d 612 (2006), where the Court held that an ERISA recovery was authorized equitable relief because the defendant had possession of the funds sought.

The Ninth Circuit's decision conflicts quite plainly with this Court's decisions. The court said "Northwest was entitled to the equitable remedy of restitution despite the fact that Mr. Cutter never possessed the medical payments it made for Devereaux's treatment." (App. 2a). That makes it a legal claim for damages and not a claim for equitable relief. Under the Court's holdings, possession of the *res* is the *sine qua non* of a claim for equitable restitution.

The Eighth Circuit Court of Appeals showed how to make the distinction between a claim for legal and equitable relief in *Hallback v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872 (8th Cir., 2009):

> In determining whether the nature of the monetary relief sought is equitable or legal, we ask whether the value of the harm done that forms the basis for the damages is measured by the loss to the plaintiff or the gain to the defendant, and whether the money sought is specifically identifiable as belonging in good conscience to the plaintiff and can clearly be traced to particular funds or property in the defendant's possession.

> *Id.*, at 883, *citing Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 596-97 (8th Cir. 2005).

Here, the harm was measured not by the gain to the defendant – of which there was none – but by the loss to the plaintiff. The district court's order awarded Northwest compensatory damages without regard to the fact that Mr. Cutter does not and never did possess the funds sought. The Ninth Circuit's decision affirmed the damages award, which is unmistakably a legal remedy and not equitable restitution.

The scope of ERISA's authorized civil remedy is an important federal matter by virtue of ERISA's preemption of state law; and this case does not involve merely an inconsistency in dicta or general principles. The conflict is genuine; the Court held in *Knudson* and *Sereboff* that possession of the funds sought is outcome determinative, while the decision below gives possession of the funds no consequence. The court of appeals clearly failed to apply the Court's decisions on this issue.

B. The Ninth Circuit's decision misconstrued, misapplied or misconceived the Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993).

The court of appeals and the district court relied on a misreading of dicta from the decision in *Mertens* to graft onto the right to equitable relief under ERISA a right to recovery of "ill gotten gains." The District Court traced "this interpretation to an earlier Supreme Court case, *Mertens v. Hewitt Associates*, in which the Court,

interpreting the same language of 'equitable relief' in § 502(a)(5), stated that it 'includes restitution of ill gotten plan assets or profits . . .' " (App. 11a). The Ninth Circuit was similarly misled. (App. 2a - 3a).

However, the operative term from the Court's dicta in *Mertens* was "restitution" and not "ill gotten plan assets". The holding and *ratio decidendi* of *Mertens* wholly support Mr. Cutter's position here.

In *Mertens*, the Court stated the issue before it as follows:

> The question presented is whether a nonfiduciary who knowingly participates in the breach of a fiduciary duty imposed by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U.S.C. § 1001 et seq., is liable for losses that an employee benefit plan suffers as a result of the breach.

Mertens v. Hewitt Associates, 508 U.S. at 249-250. The Court's holding affirmed dismissal of any such claim because claimants did not "seek a remedy traditionally viewed as "equitable", such as injunction or restitution." *Id.*, at 255. Instead, "what petitioners in fact seek is nothing other than compensatory damages – monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties." *Id.* The claim did not seek restitution, it sought damages. The issue and the Court's holding turned not on the nature of the conduct, but rather the form of relief that was sought.

Here, the court of appeals and district court focused on the alleged wrongful conduct, but ERISA focuses on the remedy, not the conduct giving rise to the claim. No other interpretation of *Mertens* is reasonable as the Court specifically refused to expand the scope of the remedy of restitution where plaintiff alleged what were in fact "ill gotten gains", indeed, the Court affirmed dismissal of such a claim.

The Petition for Writ of Certiorari should be granted in order to clarify this important and recurring issue and to prevent the misapplication of *Mertens* in future cases.

C. The Ninth Circuit's decision conflicts with the decision of the Eighth Circuit Court of Appeals.

In *Hallback v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872 (8th Cir. 2009), the court followed *Knudson* and *Sereboff* and affirmed a summary judgment that dismissed plaintiffs' ERISA claim to recover "ill gotten gains" because plaintiffs sought only damages and not recovery of specifically identifiable funds in the defendant's possession. Citing *Sereboff*, the court said,

> "equitable relief" includes a claim for restitution where the plaintiff seeks to recover "specifically identifiable" funds, that are due the plaintiff under the terms of the plan, and that are within the defendant's "possession and control". *Hallback, supra,* 561 F.3d at 883.

The court said:

> The requested relief here is in the nature of legal relief because it seeks to impose personal liability on Great-West, is measured by Plaintiffs' loss, and does not involve traceable funds that belong to Plaintiffs and are being unlawfully held by Great-West. *Id.*

Here, Northwest's suit sought to impose personal liability on Mr. Cutter, that liability was measured by Northwest's loss, and it did not involve traceable funds held by Mr. Cutter. The District Court's decision imposed a personal liability that was measured only by Northwest's loss and the court held that possession of the funds was of no consequence; the Ninth Circuit's decision affirming that outcome plainly and squarely conflicts with the Eighth Circuit's decision in *Hallback*.

D. The Ninth Circuit's decision failed to apply the accepted rules of construction applicable to health plans.

An ERISA governed benefit plan is a contract and, because ERISA does not contain a body of contract law to govern interpretation of the plan, the court will apply contract principles derived from state law. *Gilliam v. Nevada Power Company*, 488 F.3d 1180, 1194 (9th Cir. 2007). And where a term in an ERISA governed benefit plan is undefined, the court will look to the dictionary definition to determine its ordinary and popular meaning. *Id.*, at 1195.

The term married is not defined in Northwest's plan, and ordinary dictionaries show that a marriage is the legal *or* religious ceremony that formalizes marriage. In the ordinary sense of the term, one is married following either a legal or religious ceremony. A religious marriage is a marriage.

It is undisputed that Mr. Cutter and Ms. Devereaux were married in a religious ceremony conducted by an ordained minister who issued a marriage certificate. Because the ordinary meaning of married includes legal or religious marriage, the term as it is used in the health plan is ambiguous, and under the rule applicable in every state the ambiguity must be resolved in Mr. Cutter's favor. *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990).

The Ninth Circuit's decision bluntly failed to apply the accepted rules of construction applicable to ERISA governed health plans, and it did so for no stated reason.

E. The Ninth Circuit's decision is incorrect and unjust.

The decision not only conflicts with this Court's decisions and the Eighth Circuit's decision on the same issue, the decision is incorrect and unjust.

It was incorrect to use collateral estoppel and apply the judgment in the probate claim to the issue in the ERISA suit. Under settled Washington law, collateral estoppel applies only where the issue decided in the prior adjudication is identical to the issue presented in the second action. *Thompson v. State Department of*

Licensing, 138 Wn.2d 783, 982 P.2d 601 (1999). The issue is not identical where the context in which the words are used is wholly different. *Luisi Truck Lines, Inc. v. Washington Utilities and Transp. Commission*, 72 Wn.2d 887, 894-895, 435 P.2d 654, 659 - 660 (1967).

In the probate claim, the issue was whether Cutter had a community property interest in certain real estate. A community property right arises only in the context of a legal marriage. *In re Sloan's Estate*, 50 Wash. 86, 90, 96 P. 684, 685 (1908). And in the probate claim the lack of a marriage license was fatal. In that proceeding, the meaning of the word "married" as used in the health benefits plan and whether – giving the term its ordinary meaning – Mr. Cutter misrepresented his marital status were not at issue. The issue in the two proceedings was not identical and the context of the meaning of what it is to be married was wholly different.

Lastly, the result is unjust. As a consequence of this Ninth Circuit decision, a health plan is authorized to assert an ERISA claim against its beneficiary for compensatory damages caused by the beneficiary's allegedly wrongful conduct, but that same beneficiary is barred from asserting an ERISA claim for compensatory damages against the health plan for its wrongful conduct. That is not equal justice under law.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 9, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 08-35156

NORTHWEST ADMINISTRATORS, INC.,

Plaintiff - Appellee,

v.

RALPH W. CUTTER, a single person, and his estate,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted June 2, 2009
Seattle, Washington

Before: CANBY, THOMPSON and CALLAHAN, Circuit Judges.

Appendix A

MEMORANDUM*

Ralph W. Cutter ("Cutter") appeals the district court's summary judgment in favor of Northwest Administrators, Inc. ("Northwest") in Northwest's lawsuit for restitution of medical payments it made for the cancer treatment of Rosalie Devereaux ("Devereaux"), an individual Cutter listed as his spouse in his health plans. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Northwest was entitled to the equitable remedy of restitution despite the fact that Cutter never possessed the medical payments it made for Devereaux's treatment. Cutter wrongfully signed Devereaux up for benefits under his health plans when she was not his wife. *See Carpenters Health and Welfare Trust v. Vonderharr*, 384 F.3d 667, 673 (9th Cir. 2004). Devereaux could have been eligible for such benefits only if she and Cutter were married, and they were not. Cutter's representation resulted in the improper payment of over $70,000 in medical benefits for Devereaux's medical treatment. Those payments were "ill gotten gains." *See Mertens v. Hewitt Associates*, 508 U.S. 248, 260 (1993); *Cement Masons Health and Welfare Trust Fund for Northern Cali. v. Stone*, 197 F.3d 1003, 1006-07 (9th Cir. 1999); *see also Vonderharr*, 384 F.3d at 671; *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1249 (9th Cir. 2000).

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appendix A

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002), does not preclude this result. After *Great-West* was decided, we held that "*Great-West Life* was a case affirming our circuit" because the Court stated that "garden-variety legal claims for contractual restitution" are not actionable under ERISA. *Carpenters*, 384 F.3d at 673. We further restated our previous holding that "the remedy of restitution was limited to cases involving 'money obtained through fraud or wrongdoing.' " *Id.* at 671 (quoting *Cement Masons*, 197 F.3d at 1006-07). Relief under ERISA is available where the defendant "actively and deliberately" misleads the plaintiff to the plaintiff's detriment, as Cutter did by his misrepresentation that caused Northwest to pay out medical benefits for Devereaux's care. *Peralta v. Hispanic Business, Inc.*, 419 F.3d 1064, 1075 (9th Cir. 2005).

The district court correctly found, under Washington law, that Cutter is collaterally estopped from contending he was married to Devereaux. That issue was the crucial issue in his claim against Devereaux's estate in the Washington probate court. It is also the crucial issue in Northwest's claim for restitution in this case. There is no injustice by applying collateral estoppel against Cutter, and all the elements for the application of that doctrine exist. *See Thompson v. State Dep't of Licensing*, 982 P.2d 601, 605 (1999).

Finally, the words "married" and "spouse" used in Cutter's health plans are not ambiguous. There is no genuine issue of material fact as to their meaning.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE FILED JANUARY 24, 2008

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C07-0988-JCC

NORTHWEST ADMINISTRATORS, INC.,

Plaintiff,

v.

RALPH W. CUTTER, a single person, and his estate,

Defendant.

ORDER

This matter comes before the Court on Plaintiff's Motion for Summary Judgment (Dkt. No. 11), Defendant's Response (Dkt. No. 21), and Plaintiff's Reply (Dkt. No. 26), as well as Defendant's Motion for Summary Judgment (Dkt. No. 12), Plaintiff's Response (Dkt. No. 23), and Defendant's Reply (Dkt. No. 25). Having considered the parties' briefing and supporting documentation, and determining oral argument unnecessary, the Court hereby finds and rules as follows.

Appendix B

I. BACKGROUND

Plaintiff is the authorized administrator for, and the assignee of the Washington Teamsters Welfare Trust Fund ("WTWTF") and the Retirees Welfare Trust Fund ("RWTF"). (Pl.'s Mot. 1 (Dkt. No. 11) .) Defendant, a former truck driver for Safeway, was a participant in the WTWTF from at least 1994 until he retired in 2001. (*Id.* at 4.) Upon his retirement, Defendant became eligible under the RWTF. (*Id.*) The foregoing trust funds provide medical benefits for its participants, as well as for the eligible dependents of participants, including spouses. (*Id.* at 1.)

On several occasions, Defendant informed Plaintiff that he was married to Rosalie Devereaux. For example, on a 1994 WTWTF Participant Data Form, Ms. Devereaux is listed as Defendant's "spouse" in a section of the form marked "Eligible Dependent Data." (Brown Decl. (Dkt. No. 15-2).) Similarly, Defendant's 1995 WTWTF Participant Data Forms both indicate that he is married. (Brown Decl. (Dkt. Nos. 15-3 & 15-4).) Upon his retirement, Defendant submitted an Application for Coverage under the RWTF that indicates Ms. Devereaux as his spouse and specifically elects spouse coverage. (Brown Decl. (Dkt. No. 15-5).) Finally, Plaintiff received an electronic funds transfer authorization from Defendant, under the RWTF, which is signed by Ms. Devereaux as "spouse." (Brown Decl. (Dkt. No. 15-6).) On the basis of these representations, Plaintiff paid for Ms. Devereaux's medical treatment until her death from cancer in 2004. During the time

Ms. Devereaux was receiving treatment, Defendant was mailed explanation of benefits forms indicating that Ms. Devereaux was receiving medical coverage under Defendant's insurance. (*See, e.g.*, Brown Decl. (Dkt. No. 15-10).)

Upon Ms. Devereaux's passing, Defendant asserted a claim against her estate, seeking the return of his personal property and half of the community property under Washington law. (Def's Mot. 4 (Dkt. No. 12).) With its "Findings of Fact and Conclusions of Law," the Snohomish County Superior Court denied Defendant's claim after determining that Defendant and Rosalie Devereaux were never legally married, nor did they have a "meretricious relationship" under Washington law. (Leahy Decl. (Dkt. No. 18-2 at 9-10).) With regard to legal marriage, the court noted that Defendant and Ms. Devereaux participated in a "ceremony" of some kind, for which they had an unsigned certificate as a memento, however there was insufficient evidence of a legal marriage under Washington law. The court specifically noted that there was no evidence that either of them believed the person conducting the ceremony had legal authority to preside over a marriage. (*Id.* at 4.) As for whether a meretricious relationship was forged, the court relied on the fact that two days after the ceremony described above, Defendant filled out an application with the Washington State Department of Corrections that stated he was single and lived with a friend. Furthermore, both Defendant and Ms. Devereaux filed their federal tax returns as single persons in the years following the ceremony; and in her

will, Ms. Devereaux stated that she was never legally married to Defendant. (*Id.* at 4-5.) Defendant filed a motion for a new trial, or in the alternative reconsideration (Leahy Decl. (Dkt. No. 18-3)), which was denied. (*Id.* (Dkt. No. 18-4).) On appeal, Defendant did not argue that he and Ms. Devereaux were ever legally married, but rather that they had a meretricious relationship. (*Id.* (Dkt. No. 18-5).) The appellate court rejected this contention and upheld the trial court's ruling. (*Id.*)

Plaintiff filed this action to recover over $70,000 in medical benefits paid for Ms. Devereaux's treatment. Plaintiff claims it is entitled to such recovery based on: (1) equitable restitution under the Employee Retirement Income Security Act of 1974 ("ERISA"); (2) fraud under Washington law; (3) fraudulent misrepresentation under Washington law; and (4) negligent misrepresentation under Washington law. (Compl. ¶¶ 16-64 (Dkt. No. 1).)

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). There is no genuine issue for trial unless there is sufficient

evidence to support a jury verdict in favor of the nonmoving party. *Anderson,* 477 U.S. at 250. The moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Id.* at 257. Furthermore, the Court must draw all reasonable inferences in favor of the nonmoving party. *See F.D.I.C. v. O'Melveny & Myers,* 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds,* 512 U.S. 79 (1994).

In addition to demonstrating that there are no questions of material fact, the moving party must also show that it is entitled to judgment as a matter of law. *Smith v. Univ. of Washington Law School,* 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim for which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

B. Defendant's Marital Status

While many of the arguments that Defendant makes in his briefing render his marital status irrelevant to the issues on summary judgment, (Def.'s Mot. 6-11 (Dkt. No. 12)), he also suggests that this Court should revisit the state court determination on this question. (*See id.* at 11-12.) On this latter point, the Court declines. The question of whether Defendant and Ms. Devereaux were legally married was the central issue in the litigation over Ms. Devereaux's estate. A Washington state court made a final determination on an issue that is entirely

within the purview of state law, and after his motion for a new trial or reconsideration was denied, Defendant chose not to challenge the ruling on appeal. There is absolutely no basis for this Court to now call that determination into question.

Defendant argues that even if this Court were not inclined to revisit the Washington state court decision, that decision cannot be applied in this case under the theory of collateral estoppel because the issues are not identical, and applying the doctrine of collateral estoppel would work an injustice in this case. (Def.'s Resp. 3-6 (Dkt. No. 21).) Federal law "generally requires 'federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Haring v. Prosise*, 462 U.S. 306, 313 (1983) (quoting *Allen v. McCurry*, 449 U.S. 90, 96 (1980)). In order to decide whether such preclusive effect is warranted, federal courts apply the doctrine of collateral estoppel under the law of the state in which the action originated. *See, e.g., Haring*, 462 U.S. at 314-315 (applying Virginia law).

In Washington, "[t]he doctrine of collateral estoppel prevents a party from relitigating issues that have been raised and litigated by the party in a prior proceeding." *Clark v. Baines*, 84 P.3d 245, 249 (Wash. 2004). Washington courts have fashioned a four-part test to decide whether collateral estoppel should apply in a given case. Under this analysis:

> The party asserting collateral estoppel must prove: (1) the issue decided in the prior

> adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied.

(*Id.*) Failure to satisfy any one of these criterion renders the doctrine inapplicable. (*Id.*)

Defendant's reliance on the first and fourth factors of this test is unavailing. With regard to the first, Defendant argues that the issue in the probate claim was whether he and Ms. Devereaux were ever married, whereas the issue here is whether defendant misrepresented his marital status. (Def's Resp. 3 (Dkt. No. 21).) This is pure sophistry. While the two *cases* are surely different, the question of whether Defendant was legally married to Ms. Devereaux under Washington law was a crucial issue for his estate claim, and it is a crucial issue as to the viability of Plaintiff's claims in this forum. This fact also demonstrates why Defendant's claim of "injustice" under the fourth factor must fail. Because Defendant's marital status was crucial to his claim on Ms. Devereaux's estate, he cannot argue that his did not have a "full and fair opportunity to litigate" the question. Every incentive and opportunity to persuade the state court was present at that time, and therefore

Defendant is collaterally estopped from challenging whether he and Ms. Devereaux were married as that term is defined under Washington law. Thus, for the purpose of the present motions, Defendant and Ms. Devereaux were never married under Washington law.

C. "Equitable" Remedies Under ERISA

The arguments as to his marital status notwithstanding, Defendant also maintains that federal law does not offer the type of remedy Plaintiff seeks here. ERISA Section 502(a)(3) authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate *equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3) (emphasis added). Defendant argues, on the strength of two recent Supreme Court cases, that the recovery of medical benefits improperly paid on Ms. Devereaux's behalf is not an "equitable" remedy under the statute, and therefore not cognizable by this Court.

In *Great-West Life & Annuity Insurance Comp. v. Knudson*, 534 U.S. 204 (2002), the Supreme Court squarely addressed the scope of relief afforded under ERISA § 502(a)(3). That case dealt with a circumstance frequently the subject of dispute under this provision of ERISA, though not presented here, in which a plan

beneficiary who has received benefits paid by the plan, has a contractual obligation to reimburse the plan out of the beneficiary's recovery from a third party. The question presented in *Knudson*, as in many cases under § 502(a)(3), was whether a plan's attempt to enforce this reimbursement provision was "equitable relief" under the statute. Citing an earlier case on the subject, the Court first explained that "equitable relief" under § 502(a)(3) "must refer to 'those categories of relief that were *typically* available in equity . . .' " *Knudson*, 534 U.S. at 210 (emphasis in original) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)). In response to the petitioners' claim that their suit was for the traditional equitable remedy of restitution, the Court surveyed the law "in the days of the divided bench" and concluded that "not all relief falling under the rubric of restitution is available in equity." *Knudson*, 534 U.S. at 212. Rather, actions seeking to impose personal liability on a defendant for a benefit conferred were for a remedy "at law," while actions seeking "to restore to the plaintiff particular funds or property in the defendant's possession," ordinarily as a constructive trust or equitable lien, were considered "in equity." (*Id.* at 213-214.) Applying this framework to the case, the Court concluded that "[t]he basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred." (*Id.* at 214 (emphasis in original)).

While this approach may have had the effect of narrowing the scope of relief granted by courts under

§ 502(a)(3), the subsequent decision in *Sereboff v. Mid Atlantic Medical Services, Inc.* 126 S.Ct. 1869 (2006) made it clear that such relief was not reduced to a nullity. *Sereboff* also involved a contractual reimbursement provision, however the Court distinguished the two cases based on the location of the funds. Whereas in *Knudson* the plaintiff sought to impose personal liability for funds that had been set aside by law and out of the defendant's possession, *Sereboff* involved particular funds within the defendants' personal investment accounts that were owed to the plaintiff by contract. *Sereboff* 126 S.Ct. at 1874. Summing up the holding in *Knudson,* the Court in *Sereboff* emphasized that *Knudson* did not purport to "catalog all the circumstances in which equitable liens were available in equity," but simply found that "equitable restitution was unavailable because the funds sought were not in Knudson's possession." *Sereboff,* 126 S.Ct. at 1876.

Since *Knudson,* courts in the Ninth Circuit has applied this approach to other reimbursement cases, *see, e.g., Carpenters Health and Welfare Trust for Southern California v. Vonderharr,* 384 F.3d 667 (9th Cir. 2004), as well as to similar fact scenarios. *See, e.g., Honolulu Joint Apprenticeship and Training Comm. of United Ass'n Local Union No. 675 v. Foster,* 332 F.3d 1234 (9th Cir. 2003) (suit to recover training costs for an employee who breached contractual provision by working for nonunion employer not one for "equitable relief"). These cases share the common feature, also true in *Knudson* and *19 Sereboff,* of a plaintiff seeking monetary damages as a result of a contractual breach, to compensate for a benefit conferred.

What this considerable body of law does not squarely address is how the courts of equity would have treated present case, in which Plaintiff asserts that Defendant improperly procured medical benefits for a person not covered under the plan. Defendant's position is that this too is legal rather than equitable relief, citing *Knudson* and *Sereboff,* and pointing to the fact that the money was not paid to him personally, but rather to Ms. Devereaux's medical providers. However, in cases both before and after *Knudson,* the Ninth Circuit has recognized the remedy of restitution under ERISA § 502(a)(3) in situations involving "ill-gotten gains," such as "money obtained through fraud or wrongdoing." *Cement Masons Health and Welfare Trust Fund for Northern Cali. v. Stone,* 197 F.3d 1003, 1006-07 (9th Cir.1999); *see also Vonderharr,* 384 F.3d at 671; *Reynolds Metals Co. v. Ellis,* 202 F.3d 1246, 1249 (9th Cir. 2000). These cases all trace this interpretation to an earlier Supreme Court case, *Mertens v. Hewitt Associates,* in which the Court, interpreting the same language of "equitable relief" in § 502(a)(5), stated that it "includes restitution of ill-gotten plan assets or profits . . ." 508 U.S. 248, 260 (1993). Indeed commentators on the subject appear to share the view that the equitable remedy of restitution is available under these circumstances:

> In many cases, the distinction [between legal and equitable relief under § 502(a)(3)] is an easy one to draw. For example, in *Heller v. Fortis Benefits Ins. Co.,* 142 F.3d 487 (D.C. Cir. 1988), the court upheld restitution to a

> disability insurer of excess disability payments made to the insured after the insured was no longer qualified for benefits. Such a case presents no difficulty following [*Knudson*], because the remedy is clearly restoring to the plan funds wrongfully transferred from the plan to the insured.

JAYNE E. ZANGLEIN & SUSAN J. STABILE, ERISA LITIGATION 239 n. 113 (2d ed. 2005). In this Circuit, this rationale has also been found to extend to benefits improperly procured by an employer on behalf of an ineligible employee, where the action by the fund was against the employer. *Northern California Food Employers & Retail Clerks Unions Benefit Fund v. Dianda's Italian-American Pastry Co., Inc.*, 645 F. Supp. 160 (N.D.Cal.1986).[1]

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1. Defendant draws the Court's attention to another case from the Northern District of California that appears to reach the opposite conclusion. *See Trustees on Behalf of the Teamsters Benefit Trust v. Doctors Medical Center of Modesto, Inc.*, 286 F. Supp. 2d 1234 (N.D. Cal. 2003). The theory of recovery in this case however, was not that the defendant had improperly procured benefits by fraud or misrepresentation, but rather that overpayment was the result of a dispute over contract interpretation as to coverage. (*Id.* at 1238.) This appears to distinguish this case from the line of decisions in this Circuit regarding "ill-gotten gains." It is also worth noting that the defendant in that case conceded that the plaintiff had a potential remedy at law in state court, a position that Defendant here has expressly denied.

Appendix B

The Court concludes that Plaintiff seeks "equitable relief" as that phrase is defined in 29 U.S.C. § 1132(a)(3) [ERISA § 502(a)(3)]. This case is fundamentally distinguishable from the line of reimbursement cases discussed above for two reasons. First, Plaintiff is not trying to enforce a separate contractual obligation to compensate for a benefit conferred; rather, it seeks to recoup the *actual* benefit conferred. Second, Plaintiff alleges fraud and/or wrongdoing by the Defendant in procuring medical benefits, which the Supreme Court in *Mertens* and the Ninth Circuit in *Stone, Vonderharr,* and *Ellis* have explicitly recognized as giving rise to equitable relief under ERISA. Defendant's attempt to avoid this conclusion by asserting that he never retained the funds in question results from a coarse reading of *Knudson* and *Sereboff* that would truly elevate form over substance. As a plan participant, Defendant was the necessary conduit through which Plaintiff's obligation to provide benefits flowed. If he used his position to procure these benefits for Ms. Devereaux, it would surely be an impoverished view of ERISA to find this alone to be the dispositive factor as to whether Congress intended to provide relief under the statute. That the funds were spent on Defendant's behalf only means that funds actually in his possession were spared from expense. Furthermore, the Supreme Court's decisions in *Knudson* and *Sereboff* do not counsel to the contrary. Defendant appears to have latched onto language about the funds being in the defendants' possession, a crucial factor in those cases, without acknowledging that those funds were entirely separate assets from the original benefit conferred by the

plaintiffs. In the present case, Plaintiff's theory is that Defendant, through fraud or misrepresentation, appropriated money he was never entitled to; this is unjust enrichment with a remedy in equity.

Since Plaintiff seeks a form of relief cognizable under ERISA § 502(a)(3), the next question is whether it can prevail on summary judgment. Defendant argues that the terms of the plans are ambiguous as to whether a legal marriage is necessary in order to claim a spouse as a dependent. (Def's Mot. 9-11 (Dkt. No. 12).) The implication is not only that Defendant did not misrepresent his status, but also that the benefits were not improperly paid. Such ambiguity arises, according to Defendant, because the "ordinary meaning" of the terms "married" and "spouse" encompass the kind of "religious" ceremony in which he and Ms. Devereaux participated. This is not a question on which reasonable minds could differ. The fact that the plan fails to explicitly limit coverage to "legal" spouses, rather than creating ambiguity, suggests the opposite conclusion: that no such qualification is necessary for an institution that, at least in the public sphere, is inherently the product of state law. While religious traditions may have varying practices regarding marriage, the questions in this case concern the uniquely *legal* consequences of marriage. Quite tellingly, Defendant has not offered a single distinction of legal consequence that depends on any definition of marriage other than the legal one. Furthermore, Defendant's background does not suggest that he could have been caught unaware by this distinction. As the trial court found, he filed all his tax

returns during the relevant time as a single person. Furthermore, in his testimony at trial, Defendant explained that at one time he asked Ms. Devereaux to sign a prenuptial agreement because he "was kind of leery of a legal marriage." (Leahy Decl. (Dkt. No. 18-8 at 12).) This reticence may have been due to the three marriages prior to his relationship with Ms. Devereaux, something else he admitted at trial. (*Id.* at 38.) Under these circumstances, the Court is not convinced that the benefit plan was ambiguous as the meaning of "spouse," nor that Defendant was actually confused as to whether Ms. Devereaux was eligible under the plan. Without commenting on Defendant and Ms. Devereaux's relationship as interpreted by them, it is enough to say that it was not the kind that could invoke Plaintiff's obligations under the benefit plans.

D. ERISA Preemption and Plaintiff's State Law Claims

In addition to his ERISA claim, Plaintiff also brings fraud, fraudulent misrepresentation, and negligent misrepresentation claims under Washington law. (Compl. ¶¶ 30-64 (Dkt. No. 1).) Defendant argues that they are all preempted by ERISA, citing a Sixth Circuit case with a largely analogous fact pattern for support. (Def's Resp. 8 (Dkt. No. 21) (citing *Kentucky Laborers Dist. Council Health and Welfare Fund v. Hope*, 861 F.2d 1003 (6th Circ. 1988)).) Plaintiff responds by arguing that its state law claims require only a "cursory look" at the plan documents, and therefore are not preempted. (Pl's Resp. 4-5 (Dkt. No. 23) (citing *Prakash v. Pulsent Corp.*

Appendix B

Employee Long Term Disability Plan, Slip Copy, 2007 WL 1864464 (N.D. Cal. 2007)).)

ERISA's preemption clause provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title . . .

29 U.S.C. § 1144 [ERISA 514(a)]. The Supreme Court has repeatedly observed "that the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1986) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Consistent with its broad scope, ERISA's preemption clause "is not limited to state laws 'specifically designed to affect employee benefit plans.' " JORDAN, PFLEPSEN, JR., & GOLDBERG, HANDBOOK ON ERISA LITIGATION § 3.03[A] (3d ed. 2008 Supp.) (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 98 (1983)). Rather, as *Pilot Life* demonstrated, even common law tort and contract actions can be preempted if they "relate to" an employee benefit plan. *Pilot Life Ins. Co.*, 481 U.S. at 48. A number of cases in this Circuit have reached the same conclusion under similar circumstances. *See Olson*

v. General Dynamics Corp., 960 F.2d 1418 (9th Cir. 1991) (claim that level of retirement benefits was misrepresented is preempted); *Davidian v. Southern California Meat Cutters Union and Food Employees Benefit Fund*, 859 F.2d 514 (9th Cir. 1988) (claims of bad faith, fraud, deceit, and breach of fiduciary duty in the administration of an employee benefit plan are preempted); *Johnson v. District 2 Marine Engineers Beneficial Ass'n-Associated Maritime Officers, Medical Plan*, 857 F.2d 514 (9th Cir. 1988) (claims of fraud and intentional infliction of emotional distress in denial of medical benefits are preempted).

Consistent with the foregoing authority, the Court finds that Plaintiff's state law claims are preempted by ERISA. While fraud, fraudulent misrepresentation, and negligent misrepresentation are garden variety common law claims, in the particular context of this case they would directly govern the relationship between the administrator of an ERISA plan and a plan participant. Furthermore, they would purport to decide the respective obligations of the parties and level of benefits owed under an ERISA plan. Admittedly, a determination about whether Defendant misrepresented his relationship with Ms. Devereaux is not an analysis likely to seriously disrupt the federal regulatory regime under ERISA; this might be what Plaintiff means by arguing that its state law claims would require only a "cursory look" at the benefit plans in question. (Pl's Resp. 4 (Dkt. No. 23).) While perhaps a comment on the complexity of the issues raised, the need to interpret the plan only

confirms that these state law claims fall squarely within the ambit of the ERISA preemption clause. As such, they are preempted.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment (Dkt. No. 11) and Defendant's Motion for Summary Judgment (Dkt. No. 12) are both GRANTED IN PART and DENIED IN PART. Specifically, Plaintiff is granted summary judgment on its claim for equitable restitution under ERISA § 502(a)(3), however its state law claims are preempted under ERISA § 514(a). Each party shall pay its own attorneys' fees and costs. Accordingly, Plaintiff is awarded judgment in the amount of $70,838.95, plus interest.

SO ORDERED this 24th day of January, 2008.

s/ John C. Coughenour
John C. Coughenour
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 25, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-35156

D.C. No. CV-07-00988-JCC

NORTHWEST ADMINISTRATORS, INC.,

Plaintiff - Appellee,

v.

RALPH W. CUTTER, a single person, and his estate,

Defendant - Appellant.

ORDER

Before: CANBY, THOMPSON and CALLAHAN, Circuit Judges.

Judge Callahan has voted to deny appellant Cutter's petition for rehearing by the court en banc, and Judges Canby and Thompson have recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing by the court en banc is DENIED